

FILED
DEC 4 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 420

BEN ADLER SIGNS, INCORPORATED, AND ADLER
SIGN LETTER COMPANY, INCORPORATED,
Petitioners,

vs.

WAGNER SIGN SERVICE, INCORPORATED,
Respondent.

**MOTION FOR LEAVE TO FILE OUT OF TIME A PETITION FOR
REHEARING OF A PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

ARTHUR A. OLSON,
Attorney for Petitioners.

ALBERT F. MECKLENBURGER.
Of Counsel.

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*To the Honorable the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

Now come petitioners in the above entitled case and move for leave to file out of time their Petition for Rehearing (lodged herewith) upon their Petition for Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

In support of this Motion, petitioners show:

That since the entry of the order by this Honorable Court on October 28, 1940, denying the Petition for Cer-

tiorari, petitioners have engaged other counsel, who immediately upon their employment diligently began the necessary reading and studying of the record, briefs and patents involved in this litigation. It was also necessary for present counsel to engage and instruct accountants to prepare the account ordered by the Master in this case and to appear in court to move for an extension of time within which to file the required report. In addition, counsel was required to study the Petition for Certiorari to determine if said petition properly presented the grounds for certiorari and finding that it did not, to prepare a petition for rehearing. Under these circumstances it was practically impossible to properly prepare and present the present Petition for Rehearing within the time counsel was retained and the expiration of the twenty-five (25) day period provided for in Rule 33, all of which is shown by the annexed affidavit of Albert F. Mecklenburger.

That the manufacture and sale of the devices involved in this case are confined to the parties in this litigation, consequently there is little, if any, possibility that another Circuit Court of Appeals will ever be afforded the opportunity of passing upon the patent in suit. These circumstances take this case outside the general rule requiring a conflict of decisions as a prerequisite to the grant of a writ of certiorari in patent cases, and bring it directly within the rule of *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50.

That the spark of genius which distinguishes invention from mere mechanical skill is wholly absent from the patent in suit. This lack of inventive genius was the cause of concern to the District Court and to the Circuit Court of Appeals, both of which expressed their doubts as to the validity of the patent.

That the Petition for Writ of Certiorari and the Petition for Rehearing thereon are meritorious, and in the interest

of justice this Honorable Court should not refuse to review this case at this time.

Wherefore, it is prayed that leave be granted Petitioners to file their Petition for Rehearing (lodged herewith) of their Petition for Writ of Certiorari.

BEN ADLER SIGNS, INCORPORATED,
ADLER SIGN LETTER COMPANY, INCORPORATED,
Petitioners.

ARTHUR A. OLSON,
Attorney for Petitioners.

ALBERT F. MECKLENBURGER,
Of Counsel.

It is hereby certified that the foregoing Motion for Leave to File Petition for Rehearing is believed to be well founded in law and in fact, and that it is not interposed for the purpose of delay.

ARTHUR A. OLSON.

AFFIDAVIT OF ALBERT F. MECKLENBURGER.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

ALBERT F. MECKLENBURGER being first duly sworn deposes and says:

I am one of the senior members of the law firm of Thiess, Olson & Mecklenburger with offices at 77 West Washington Street, Chicago, Illinois.

Some time after Petition for Certiorari was denied by this Honorable Court, my firm was retained by Ben Adler Signs, Incorporated, and Adler Sign Letter Company, Incorporated, as their counsel in the case of Wagner Sign Service, Incorporated *vs.* Ben Adler Signs, Incorporated, and Adler Sign Letter Company, Incorporated.

Since my firm has been employed, I have been in direct charge of all matters pertaining to this case and I have been diligently engaged in reading and studying the record, briefs and patents involved in this litigation. A number of other matters of importance in this case were pressing. Defendants were under order to account and it was necessary for me to engage a firm of accountants and instruct them in the manner and form of the account. This required much time and effort. It was also necessary for me to appear in court to move for an extension of time to file the required report.

It was necessary also to make a study of the Petition for Certiorari to determine if said Petition properly presented the grounds for certiorari, and finding that it did not, to prepare a Petition for Rehearing.

In the circumstances it was practically impossible in the short period between the time my firm was retained in this matter and the expiration of the twenty-five (25)

day period provided for in Rule 33 of this court to properly prepare and present the present Petition for Re-hearing.

ALBERT F. MECKLENBURGER.

Sworn and subscribed to before me this 29 day of November, A. D. 1940.

EILEEN M. DAVIS,
Notary Public.

My commission expires April 27, 1944.